**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

April 17, 1997

**NOTICE**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**No. 95-3380**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**JAMES D. LUEDTKE,**

**Petitioner-Appellant,**

**v.**

**DAVID H. SCHWARTZ,**

**Respondent-Respondent.**

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APPEAL from an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. James D. Luedtke appeals from an order dismissing his petition for a writ of certiorari challenging his parole revocation. The issues are: (1) whether Luedtke had passed his mandatory release date and should have been released outright, rather than placed on parole; (2) whether Luedtke was denied procedural due

process of law; and (3) whether there was substantial evidence to support the decision. We conclude that the trial court properly dismissed Luedtke's petition. Therefore, we affirm.

Luedtke was convicted of armed robbery on August 6, 1987, and was sentenced to ten years in prison. On December 22, 1993, Luedtke was released on parole. One of the conditions of Luedtke's parole was that he not "possess, own or carry any firearm or any weapon."[1] On September 25, 1994, Luedtke sold a handgun to an undercover police agent in violation of that condition.

The administrative law judge revoked Luedtke's parole and returned him to prison for the maximum term available for reincarceration, three years and twelve days. The Department of Corrections Appeals Division (division) affirmed the revocation. The trial court dismissed Luedtke's petition for a writ of certiorari because Luedtke's submissions were unjustifiably delinquent, wholly conclusory and without merit.[2] Luedtke appeals.[3] However, he does not identify the issues he seeks to raise and fails to develop his contentions. *See* RULE 809.19(1)(b), (d) & (e), STATS. Consequently, we have distilled his complaints into three issues, none of which have merit, particularly in the limited context of judicial review of certiorari actions:

> When reviewing probation revocation determinations, we defer to the division's determinations. The scope of review is limited to the following questions: (1) whether the division kept within its jurisdiction; (2) whether the division acted according to law; (3) whether the division's actions were arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that

[1] Probation/Parole Rule No. 11.

[2] The trial court noted that Luedtke's initial "brief" was almost six weeks late, three-quarters of a page in length and wholly conclusory.

[3] Luedtke then moved the supreme court for bypass and alternatively petitioned for review. *See* RULES 809.60 & 809.62, STATS. The supreme court dismissed those motions on January 23, 1997.

> the division might reasonably make the order or determination in question.

***Von Arx v. Schwarz***, 185 Wis.2d 645, 655, 517 N.W.2d 540, 544 (Ct. App. 1994) (citation omitted).

*Mandatory Release Date*

Luedtke's threshold contention is that with sentence credit for good time, he had reached his mandatory release date. He reasons that had he not been on parole, his conduct would not have been actionable. However, he provides no authority for this contention. Luedtke was convicted on August 6, 1987, and sentenced to ten years in prison. He contends that he reached his mandatory release date on December 22, 1993, when he claims he was illegally placed on parole. Luedtke cannot prevail on his mandatory release theory. *See* § 302.11, STATS., (inmate is entitled to mandatory release *on parole*) (emphasis supplied).

*Procedural Due Process of Law*

Luedtke claims that he was denied procedural due process of law because: (1) he did not receive an adequate "warning"; (2) his revocation hearing was not conducted within sixty days; (3) there was "no probable cause to proceed"; (4) he was not allowed to present two witnesses to testify in his defense; and (5) he was not allowed to cross-examine his accusers. He has not developed any of these contentions. He cites ***State ex rel. Plotkin v. DHSS***, 63 Wis.2d 535, 217 N.W.2d 641 (1974), to support his "warning" claim without explaining the "warning" to which he claims entitlement, or how ***Plotkin*** supports his

position.[4] Luedtke does not explain the consequences of failing to timely hold his revocation hearing. More importantly, the record shows that the hearing was adjourned "at the request of the parties." There is no basis for Luedtke's remaining contentions.[5]

*Substantial Evidence*

> We may not substitute our judgment for that of the division; we inquire only whether substantial evidence supports the division's decision. If substantial evidence supports the division's determination, it must be affirmed even though the evidence may support a contrary determination. `Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion.'

***Von Arx***, 185 Wis.2d at 656, 517 N.W.2d at 544 (quoted source and citation omitted).

Luedtke claims that: (1) he was entrapped and thus, illegally arrested; and (2) his revocation was based on the testimony of a frequently unemployed, drunken liar.[6]

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[4] Plotkin's violation of a condition of his probation resulted in revocation. ***State ex rel. Plotkin v. DHSS***, 63 Wis.2d 535, 537-38, 217 N.W.2d 641, 642 (1974). A special provision was incorporated into Plotkin's probation agreement. The provision was designed to keep Plotkin, a convicted gambler, from frequenting a bar which he owned and where he had gambled frequently. Plotkin was afforded a three-month grace period from complying with this condition to allow him to terminate his ownership interest in the bar. ***Id.*** Thereafter, Plotkin told his probation agent that, despite that special provision, he would continue to frequent the bar, not to engage in any illegal activity, but merely "to pick up his mail . . . or to have a cup of coffee." ***Id.*** Plotkin argued that had he known he was risking jail time by frequenting the bar, he would not have done so. ***Id***. at 539, 217 N.W.2d at 643. The court rejected that contention. ***Id.*** at 547-48, 217 N.W.2d at 646-47. To the extent ***Plotkin*** is relevant to Luedtke's contention, it does not support it.

[5] Luedtke claims that there was no probable cause to arrest him. He designates a transcript excerpt in which a police officer was precluded from testifying on the ultimate determination of whether he "agree[d] that probable cause was lacking," followed by Luedtke's acknowledgment that he had no further questions of that witness. This non-answer proves nothing. The division concluded that Luedtke and his counsel made a tactical decision to proceed without calling witnesses. Luedtke does not identify the witnesses he was precluded from cross-examining. The tape recording of the hearing also belies Luedtke's claims.

[6] On cross-examination, Luedtke emphasized that his principal accuser believed that he would receive a reward for testifying against Luedtke. Consequently, the administrative law judge was aware of an alleged ulterior motive.

However, Luedtke does not develop these seemingly inconsistent theories.[7] Moreover, "certiorari is not a *de novo* review." ***Van Ermen v. DHSS***, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978). On certiorari, a reviewing court does not weigh the evidence presented, but defers to the division's determinations. *See* ***id***. This court's inquiry is limited to whether there is substantial evidence to support the decision. *See* ***id.*** The administrative law judge found that Luedtke had violated his parole, notwithstanding the defendant's version of events. We conclude that there is substantial evidence to support revocation.

. Luedtke's remaining contention is that there was "no solid, factual basis for concluding that there existed no viable or feasible alternative to revocation of parole" and no consideration of a placement which was less restrictive than prison. We disagree.

The administrative law judge found that Luedtke had violated a condition of his parole by possessing a handgun and he concluded "that such violation demonstrates there is no viable and feasible alternative to revocation and warrants his reincarceration for three years and twelve days to protect the public from further criminal activity by him." Luedtke's parole agent recommended reincarceration after having rejected several less restrictive alternatives. The parole agent explained that the Division of Intensive Sanctions (DIS) was inappropriate because "the assaultiveness involved in [the underlying offense of armed robbery] does not fit the DIS eligibility criteria." Because Luedtke knew that possession of a firearm was a violation of his parole, formal counseling was inappropriate. Because involvement with a handgun and Luedtke's underlying conviction for armed robbery did not demonstrate an absence of dangerousness, halfway house placement was inappropriate. Ultimately, the parole agent concluded that psychological counseling for dangerousness could be appropriately addressed in a correctional setting. We reject

[7] At apparent odds with the entrapment defense is Luedtke's claim that he merely observed or facilitated the sale of his sister-in-law's handgun by his brother.

Luedtke's contention that there was no consideration of alternatives to revocation and reincarceration.

*By the Court*.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.